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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/769,628	01/25/2001	George B. Diamond	P/2790-71	5333

2352 7590 01/22/2007  
OSTROLENK FABER GERB & SOFFEN  
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NEW YORK, NY 100368403

EXAMINER
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WEINSTEIN, STEVEN L

ART UNIT	PAPER NUMBER
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1761

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	01/22/2007	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

## Office Action Summary

**Application No.**

09/769,628

**Applicant(s)**

DIAMOND ET AL.

**Examiner**

Steven L. Weinstein

**Art Unit**

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 06 October 2006.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1-15 and 17-32 is/are pending in the application.
- 4a) Of the above claim(s) 6-14 and 23-32 is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1-5, 15 and 17-22 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

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Claims 1-5, 15 and 17-22 are rejected under 35USC112, first paragraph as being non-enabling for the reasons given in the Office actions mailed 4/4/03, 11/26/03, and 8/13/04. The rejection stands for the reasons given previously. As disclosed there is a functional relationship between the structural elements of the claim and the headspace (which is also defined by the level of the contents), which is not recited. Also, the phrases such as "extending downwardly" and the "raised portion" are not further defined to reference how the elements are related to each other.

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 1,2,4,15, and 17-22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Diamond et al ('237) in view of Knize ('388), further in view of Creegan ('765) and Shepard ('080), further in view of Wilkinson et al ('933), Malmquist ('239), Jones ('867), Pettit et al ('140) and Rayzal ('279) for the reasons given in the Office actions mailed 11/26/03, 8/13/04, and 12/19/05.

Claims 3 and 5 are rejected under 35 U.S.C. 103(a) as being unpatentable over the references as applied to claim 1 above, and further in view of Saunders ('774) for the reasons given in the Office action mailed 4/4/03.

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

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(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

Upon further consideration and review of the claim language, the following rejection is made.

Claims 1 and 15 are rejected under 35 U.S.C. 102(b) as being anticipated by Diamond et al (5,804,237).

In regard to claim 1, Diamond et al discloses an apparatus for containing sterilized edible material which comprises a thin walled sealed container containing edible material sterilized in a sterilization process and an inert gas under pressure, the side wall of the container being maintained rigid by the pressure of the inert gas but being easily deformable in the absence of such pressure, the container having a top end and a bottom end with the top end extending downwardly from an upper chime at the side wall and then extending inwardly of the side wall, the top end having a raised portion being formed inwardly of the side wall. This raised portion can be construed as being either the entire portion of the lid defined by either the first raised circumferential element or the second, innermost raised circumferential element just as applicant is now defining his raised portion as the entire portion of the lid defined by the circumferential element #34. Further in regard to claim 1, Diamond et al discloses the raised portion has an upper surface which is "substantially" the same height as the upper chime. In this regard, not only is "substantially" not defined, but a horizontal line across from either of the raised portions of Diamond et al show that the raised portions are substantially the same height as the mid-point of the chime. That is, the chime has a

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length, and the claims do not recite a specific height relative to the chime's extent (e.g. such as "the uppermost portion of the chime"). Continuing with reading Diamond et al on the claim language, Diamond et al further discloses that the raised portion (in fact, either the raised portion defined by the outer raised area, or the raised portion defined by the inner raised area, has a concavity having a concave slope relative to the inside of the container and is made of a material having a thickness and shape such that the concavity will retain a substantially concave slope before, during and after sterilization, but will become convex only if there is any additional gas pressure generated due to bacterial action in the pressurized sealed container and the raised portion defines an increased volume of the container as compared to a container of similar dimensions without a raised portion.

All of applicants remarks filed 4/13/06 have been fully and carefully considered but are not found to be convincing. Applicants' comments relative to the 35USC112,1<sup>st</sup> paragraph rejection is not found to be convincing. Without the dimensional and functional relationships discussed on the record, the container merely defines some design features of conventional structural elements which by themselves are just that, i.e., obvious matter of conventional design. As disclosed, it is the at least qualitative relationship between the structural features, the contents and the head space which achieves the purported disclosed result. As disclosed, one wants to increase the volume of the headspace relative to Diamond so that increased pressure will be absorbed. If one provides a concavity in the raised portion that is very concave in depth or if the concavity is a wider span, then this will impact on the headspace volume and provide a

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volume that can be less than one wherein the raised portion is minimal but the concave portion is not as deep. Similarly, as for the new phrase that the raised "portion" (sic) defines an increased volume of the container as compared to a container of "similar" dimensions without the raised portion, this phrasing is ambiguous as to the word "similar" and whether all other elements being otherwise equal. Clearly Diamond meets this recitation of having a greater volume relative to a container that has a cover that starts its concave portion right from the chime. It is interesting to note in this regard that figure 2 of the present application, which is disclosed as the can of Diamond, shows a cover that starts its concavity right from the chime, but Diamond clearly shows a differently shaped cover than that shown in figure 2. Thus, applicants' urging on page 5 of the remarks that Diamond starts the concavity at the chime is just not accurate.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Steven L. Weinstein whose telephone number is 571-272-1410. The examiner can normally be reached on Monday-Friday 7:00 A.M.-2:30 P.M..

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Milton Cano can be reached on 571-272-1398. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

Steve Weinstein  
STEVE WEINSTEIN  
PRIMARY EXAMINER 1761  
1/18/07